



In The
Supreme Court
of the United States

OCTOBER TERM, 1977

No. **77-1657**

TEXAS EMPLOYER'S INSURANCE ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit*

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SUBJECT INDEX

	Page
Opinions delivered in courts below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions and regulations involved	3
Statement of the case	3
Reasons for granting the writ	4
Conclusion	7
Appendix	

Table of Authorities

Cases:	Page
Pennsylvania National Mutual Cas. Ins. Co. v. Barnett, 445 F.2d 573 (5th Cir. 1971)	2,4,5
Texas Employers' Ins. Ass'n v. United States, 390 F.Supp. 142 (N. D. Tex. 1975)	4
United States v. Bender Welding & Mach. Co., 558 F.2d 761 (5th Cir. 1977)	2
United States v. Chicago White Metal Casting Company (N. D. Ill., Eastern Div., 1974) (unreported) (App. M)	4
United States v. Kirkland, 405 F.Supp. 1024 (E. D. Tenn. 1975)	4
United States v. Standard Oil Co., 332 U.S. 301 (1947)	2,4
 Constitution:	
U.S. CONST. art I, § 1	3,6
 Statutes:	
Art. 8306, §3, Texas Revised Civil Statutes	3,6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1345	4
38 U.S.C. § 210(c)	2,5
38 U.S.C. § 210(c)(1)	3
38 U.S.C. § 610(a)(1)(B)	3
38 U.S.C. § 621	2, 3, 5
42 U.S.C. §§ 2651-53	3,4
 Regulations:	
38 C.F.R. § 17.48(d)	2,3,5

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*To The Honorable Warren E. Burger, Chief Justice of the
Supreme Court of the United States and The Associate
Justices of the Supreme Court of the United States:*

Petitioner, TEXAS EMPLOYER'S INSURANCE ASSOCIATION, prays that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit to review its decision that the United States may recover from a workmen's compensation carrier the cost of medical care provided to a veteran who is also covered by a workmen's

compensation statute, and that on hearing, its judgment be reversed and the trial court's judgment be affirmed.

THE OPINIONS BELOW

The district court entered a summary judgment against the United States (Appendix A). Two unreported memoranda opinions were filed by the court (Appendices B and C). The Court of Appeals opinion (Appendix D) is reported at 558 F.2d 766. The case of *United States v. Bender Welding & Mach. Co.*, 558 F.2d 761, was consolidated on appeal with the case at bar and the opinion was delivered the same day (Appendix E). The opinion on rehearing is not yet reported (Appendix F).

JURISDICTION

The date and time of entry of the judgment sought to be reviewed is September 1, 1977. Petition for Rehearing was denied on March 16, 1978. This court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States may recover from a workmen's compensation carrier the reasonable cost of medical care provided by the Veterans Administration in the absence of legislation authorizing such recovery.
2. Whether the decision of the Court of Appeals is in conflict with Article I, Section 1 of the Constitution, the decision in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), or with a prior decision by the Court of Appeals for the Fifth Circuit in *Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971).
3. Whether Congress authorized recovery of such medical care costs in giving the Veterans Administrator rule-making power through 38 U.S.C. §210(c) and 38 U.S.C. §621.
4. Whether the Administrator's regulation, 38 C.F.R.

§17.48(d), purports to create a new substantive legal liability and, if so, whether it is within his statutory authority.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

U.S. CONST. art. I, § 1

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Statutes

38 U.S.C. § 210(c)(1); pocket part, page 23 (Appendix G)
 38 U.S.C. § 610(a)(1)(B); pocket part, page 105 (Appendix H)
 38 U.S.C. § 621; pocket part, page 117 (Appendix I)
 42 U.S.C. §§ 2651-53; pages 327-328 (1962) (Appendix J)
 Art. 8306, § 3, Texas Revised Civil Statutes, page 11 (Appendix K)

Regulation

38 C.F.R. § 17.48(d), pages 550-551 (Appendix L)

STATEMENT OF THE CASE

On December 23, 1973, Henry Adams, a veteran, sustained an injury while working for Affiliated Foods, Inc., Amarillo, Texas, which carried workmen's compensation insurance with Petitioner under the Texas Workmen's Compensation Act. He was admitted to the Veterans Administration Hospital, Amarillo, Texas and treated there. After his discharge, the Veterans Administration sought to recover \$1,989.85 as costs of medical care from Petitioner.

Petitioner refused payment and the United States, through the Veterans Administration, filed an independent claim with the Texas Industrial Accident Board. The Board ordered Petitioner to pay the claim, and Petitioner filed suit in state court to set aside the Board's award and for judgment that the United States take nothing. The United States removed the case to federal court and filed a counterclaim for the cost of medical care.

Federal jurisdiction attached under 28 U.S.C. § 1345 because, though nominally a defendant, the United States commenced the proceeding with the Industrial Accident Board and was in substance the plaintiff in the case.

REASONS FOR GRANTING THE WRIT

While no statistics are available, it is a known fact that many veterans who are injured on their jobs and are covered by workmen's compensation are treated in Veterans Administration hospitals. This is a matter of substantial national magnitude, and whether the United States can recover for such medical care is an important federal question which should be settled by this court.

Three United States district courts have allowed recovery. They are *United States v. Kirkland*, 405 F.Supp. 1024 (E.D. Tenn. 1975); *Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, (unreported), reversed 445 F.2d 573 (5th Cir. 1971); and *United States v. Chicago White Metal Casting Company*, (N.D. Ill., Eastern Div., 1974) (unreported) (Appendix M). The Fifth Circuit in *Barnett* reversed the district court and denied recovery. Recovery was also denied in *Texas Employers' Ins. Ass'n. v. United States*, 390 F.Supp. 142 (N.D. Tex. 1975).

The historical setting of this case began with *United States v. Standard Oil Co.*, 332 U.S. 301 (1947). The court there held that the government could not recover medical expense or soldier's pay from a tortfeasor because Congress had created no such remedy.

Fifteen years later, Congress enacted the *Federal Medical Care Recovery Act*, 42 U.S.C. §§ 2651-53 (1962). This Act created a right of recovery in the United States for medical care "under circumstances creating a tort liability upon some third person . . . to pay damages therefor." The Act does not create any right to recover under contract or workmen's compensation statutes.

Congress has not expressly authorized recovery of the cost of medical care to veterans covered by workmen's compensation insurance. It has given the Veterans Administrator power "to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans Administration . . ." 38 U.S.C. § 210(c). The Administrator is also authorized to prescribe "such rules and procedures governing the furnishing of hospital and domiciliary care as he may deem proper and necessary" and "limitations in connection with the furnishing of hospital and domiciliary care . . ." 38 U.S.C. § 621.

Purporting to act under authority of these statutes, the Administrator has promulgated a regulation requiring that patients who might be entitled to medical benefits under a workmen's compensation law be requested to assign those benefits. 38 C.F.R. § 17.48(d).

In *Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971), the court considered the *Standard Oil* case, the *Medical Care Recovery Act*, and the regulation. The facts were identical to the case at bar except that the veteran had not executed an assignment.

The court held that the *Standard Oil* case applied to a workmen's compensation carrier as well as to a tortfeasor and pointed out that there is no federal common law which would allow recovery and therefore only Congress could create the right. The *Medical Care Recovery Act* was limited to torts. The court did not reach the assignment regulation, since there was no assignment, and refused to allow recovery.

The Court of Appeals in the case at bar holds that, since the United States has an assignment from the injured workman, neither the *Standard Oil* case nor the *Barnett* case precludes

recovery. The basis of the court's decision is that the assignment subrogates the government to the workman's rights and thus no new substantive right is created.

The decision is both factually and legally incorrect. It is also directly contrary to the *Standard Oil* and the *Barnett* cases, which hold that only Congress can create this kind of right of recovery.

The United States did not become a subrogee by virtue of the assignment. In fact, the assignment was void under Texas law. Art. 8306, §3, Texas Revised Civil Statutes. The United States did not file its claim as a subrogee through the assignment but as an independent claimant, and was awarded recovery by the Texas Industrial Accident Board as an "independent claimant" (Appendix N).

The decision of the Court of Appeals in this case is contrary to both the spirit and letter of the *Standard Oil* and *Barnett* cases. It has the effect of creating a new federal right of recovery of major national importance without legislative aid.

In fact, the decision amounts to a usurpation of the legislative function of Congress in violation of Article I, Section 1 of the United States Constitution.

This case involves a major right of recovery by the United States. It also involves important federal questions which should be decided by this court.

CONCLUSION

TEXAS EMPLOYER'S INSURANCE ASSOCIATION, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

GIBSON, OSHSNER & ADKINS
500 First National Bank Building
Amarillo, Texas 79101

By _____
James H. Doores, of Counsel
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the Petition for Writ of Certiorari have the _____ day of May, 1978, been placed in the United States mail, postage prepaid, addressed as follows:

William Kanter
Neil H. Koslowe
Department of Justice
Civil Division — Appellate Section
Washington, D.C. 20530

Solicitor General
Department of Justice
Washington, D.C. 20530

James H. Doores

INDEX TO APPENDIX

	Page
Appendix A — Summary Judgment entered by district court	A-1
Appendix B — Memorandum Opinion, unreported	A-3
Appendix C — Memorandum Opinion, unreported	A-6
Appendix D — Court of Appeals Opinion, 558 F.2d 761	A-9
Appendix E — United States v. Bender Welding & Mach. Co., 558 F.2d 761	A-14
Appendix F — Opinion on Rehearing (unreported)	A-23
Appendix G — 38 U.S.C. § 210(c)(1), pocket part, page 23 .	A-26
Appendix H — 38 U.S.C. § 610(a)(1)(B), pocket part, page 105	A-27
Appendix I — 38 U.S.C. § 621, pocket part, page 117	A-28
Appendix J — 42 U.S.C. §§ 2651-53, pages 327-328	A-29
Appendix K — Art. 8306, § 3, Texas Revised Civil Statutes, page 11	A-33
Appendix L — 38 C.F.R. § 17.48(d), pages 550-551	A-35
Appendix M — United States v. Chicago White Metal Casting Company (N. D. Ill., Eastern Div., 1974) (unreported)	A-36
Appendix N — Texas Industrial Accident Board Award	A-43

A-1

APPENDIX A

In The United States District Court
For The Northern District of Texas
Amarillo Division

Civil Action No. CA-2-75-61

Texas Employer's Insurance Association,
Plaintiff,

vs.

United States of America,
Defendant.

ORDER AND JUDGMENT

This cause came on to be heard on motion of Defendant for Summary Judgment and on cross-motion of the Plaintiff for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, the briefs of the parties, and having heard and argument of counsel, and due deliberation having been had thereon, it is

ORDERED that Defendant's motion for summary judgment be and the same hereby is denied, and it is further

ORDERED that Plaintiff's motion for summary judgment be and the same hereby is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the final award of the Industrial Accident Board of the State of Texas in Cause No. M-036104-N2 styled Henry H. Adams v. Affiliated Foods, Inc., employer, and Texas Employers' Insurance Association, insurance carrier, insofar as such award orders payment to the Veteran's Administration of \$1,989.85, such award being dated March 4, 1975, be and the same hereby is in all things set

A-2

aside and held for naught. Such award is set aside only to the extent of such payment to the Veteran's Administration and not in the Board approval of the compromise settlement agreement entered into between Henry Adams and Texas Employers' Insurance Association.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant take nothing by its counterclaim and that Plaintiff is discharged from all liability, and that Plaintiff recover its costs.

ENTERED this 18th day of February, 1976.

/s/ Halbert O. Woodward
Halbert O. Woodward
United States District Judge

A-3

APPENDIX B

In The United States District Court
For The Northern District of Texas
Amarillo Division

Civil Action No. CA-2-75-61

Texas Employers' Insurance Association,

Plaintiff.

vs.

United States of America,

Defendant.

MEMORANDUM

Plaintiffs originally brought this case in the 181st Judicial District Court of Randall County, Texas, seeking to set aside the award of the Industrial Accident Board in favor of one Henry H. Adams, an employee of Affiliated Foods, Inc. The employer and employee were covered by a workmen's compensation insurance policy issued to Affiliated Foods, Inc., as subscriber, under the Workmen's Compensation Laws of the State of Texas. Mr. Adams sustained an accidental injury while in the course of his employment, and after following the correct procedures, the Industrial Accident Board entered a final award in said cause on March 4, 1975 ordering the Texas Employers' Insurance Association to pay to the Veterans Administration, an independent claimant, the total of \$1,989.85. The pleadings indicate that Mr. Adams received treatment through the Veterans Administration Hospital at Amarillo, Texas for the injuries sustained by him while in the course of his employment and covered by such Workmen's Compensation insurance policy.

After removal to this court, each party filed motion for summary

judgment, and it appears to the court that there is no dispute as to the material facts necessary to the entry of the judgment hereinafter ordered. The fact of the injury while Mr. Adams was employed by Affiliated Foods, Inc., the issuance of the workmen's compensation policy by the plaintiff in this case, and the fact that Mr Adams received treatment for such injuries at the Veterans Administration Hospital are all undisputed. The sole and only question to be determined is one of law and that is whether or not the United States of America can recover for the reasonable and necessary costs of the medical services furnished Mr. Adams under these circumstances.

This question has been answered in the negative by at least three courts in written opinions which are controlling as to the question of law raised here. The United States Supreme Court in *United States v. Standard Oil Company*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067; the United States Court of Appeals for the Fifth Circuit in *Pennsylvania National Mutual Casualty Insurance Company v. Barnett*, 445 F.2d 573 (1971); and the United States District Court for the Northern District of Texas in an opinion by Judge Brewster in *Texas Employers' Insurance Association v. United States of America*, 390 F. Supp. 142 (1975), and each case is authority for granting summary judgment in favor of the plaintiff in this case. This court agrees with the ultimate decision and the reasoning supporting such decisions, and also is bound to follow such decisions and will, therefore, enter a summary judgment in favor of the plaintiff.

It is realized that the Federal Rules of Civil Procedure contemplate that a hearing may be afforded the parties before the entry of summary judgment, but it appears to this court that the matter has been fully briefed and argued in the submissions of the parties. It is therefore ORDERED that the attorney for the plaintiff prepare an appropriate summary judgment granting its motion in connection therewith, and if the attorney for the

defendant desires a hearing, this court will be notified by February 17, 1976 of such desire so that a hearing can be set during that week. If no such notification is received by the court, the motion for summary judgment will be entered when submitted by the attorney for the plaintiff.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 11th day of February A.D. 1976.

/s/ Halbert O. Woodward
 Halbert O. Woodward
 United States District Judge

APPENDIX C

In The United States District Court
For The Northern District of Texas
Amarillo Division

Civil Action No. CA-2-75-61

Texas Employers' Insurance Association,
Plaintiff,

vs.

United States of America,
Defendant.

SUPPLEMENTAL MEMORANDUM

Pursuant to a memorandum and order of this court dated February 11, 1976, the attorney for the defendant requested that the court hold a hearing on the motions for summary judgment. Such hearing was held in Amarillo, Texas on February 17, 1976 with attorneys for both parties present.

At such hearing, the attorney for the government urges the court to enter judgment in its favor because 38 C.F.R. § 17.48(d), which is a regulation promulgated by the Veterans Administration, provides for recovery by the Veterans Administration for hospital and medical services furnished by it to a veteran who is covered by workmen's compensation benefits, such recovery to be from the workmen's compensation insurance carrier. Additionally, the government argues that recovery should be allowed and permitted in this case because the government is a third party beneficiary to the workmen's compensation insurance policy.

The court is of the opinion that its original memorandum of

February 11, 1976 correctly sets forth the applicable law and supports a summary judgment in favor of the plaintiff, Texas Employers' Insurance Association.

Judge Brewster, in *Texas Employers' Insurance Association v. United States of America*, 390 F.Supp. 142 (N.D. Tex. 1975), has answered this contention in detail. His judgment and opinion in that case clearly holds that only the Congress has the authority to create a new substantive legal liability or right. The Congress has not so provided in the case of workmen's compensation benefits and policies as it has done in those instances where the victim is injured as a result of a tort committed by a government employee. See 42 U.S.C. § 2651(a) — which statute does not apply to workmen's compensation claims. The requirement of Congressional action to authorize the government to recover for medical benefits furnished an injured employee covered by workmen's compensation is exactly the same as it was in tort actions prior to the enactment of 42 U.S.C. § 2651(a) in 1962. *United States v. Standard Oil Company*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067.

Further, the government has no more right to recover for the value of the hospital expenses it furnished to an injured employee, formerly a veteran, under the theory that it is a third party beneficiary than it would have the right to recover under the ab regulation of the Veterans Administration. Here, again, the Congress has not acted to create this substantive legal right of recovery in the government. The holding of *United States v. Standard Oil Company*, *supra*, and *Texas Employers' Insurance Association v. United States of America*, *supra*, and the reasoning of these decisions prevent the government's recovery on a third party beneficiary theory.

A-8

Accordingly, a summary judgment will be entered on behalf of the plaintiff, Texas Employers' Insurance Association.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 18th day of February A.D. 1976.

/s/ Halbert O. Woodward
Halbert O. Woodward
United States District Judge

A-9

APPENDIX D

Texas Employers' Insurance Association,
Plaintiff-Appellee,

v.

United States of America,
Defendant-Appellant.

No. 76-2056.
United States Court of Appeals,
Fifth Circuit.
Sept. 1, 1977.

Appeal from the United States District Court for the Northern
District of Texas.

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This case presents the sole question of whether the United States can recover the cost of medical services provided through a Veterans Administration hospital to an injured veteran-employee covered by the Texas Workmen's Compensation Act, Texas Rev.Civ.Stat.Ann. arts. 8306-8309 (Vernon 1967). The legal issue is a variation of that decided in favor of the Government in *United States v. Bender Welding & Machine Co.*, ____ F.2d ____, Docket No.s 76-1770 and 76-1916, with which this case was consolidated. In those cases the employees were covered by the federal Longshoremen's compensation act, here by a state compensation act. The result, rationale, and holding of the cases are the same. We treat this case separately only to more easily discuss the issue in the state compensation act context. Here the

state board directed the compensation carrier to pay the cost of medical care provided by the V.A. hospital. The district court set aside that part of the award. We reverse the district court.

Adams, a veteran, was injured in the course of his employment with Affiliated Foods, Inc., a company subject to the Texas Workmen's Compensation Act. He was admitted to the Veterans Administration hospital, but transferred immediately to a private hospital for surgery. A few days later he returned to the V.A. hospital where he remained until his discharge two weeks later.

Adams had been admitted to the V.A. hospital only after the Veterans Administration had determined, in accordance with U.S.C.A. § 610(a)(1)(B), that he was a veteran with a non-service-connected disability, and was "unable to defray the expenses of necessary hospital care."¹ Subsequent to his release, Adams filed a claim for state workmen's compensation. The Veterans Administration then obtained an assignment of all workmen's compensation claims that he might have for medical services rendered by the Veterans Administration, and billed him for the cost of these services.

The Texas Industrial Accident Board approved a "compromise settlement" between Adams and Texas Employers' Insurance Association, which included "all accrued hospital and

¹ Until amendment in 1976, the Veterans' Benefit Act provided in pertinent part: (a) The Administrator, within the limits of Veterans' Administration facilities, may furnish hospital care or nursing home care which he determines is needed to—

(1) * * *

(B) any veteran for a non-service-connected disability if he is unable to defray the expenses of necessary hospital or nursing home care.

Veterans' Benefits Act of 1957, P.L. 85-56, § 510, 71 Stat. 111, as amended P.L. 85-857, 72 Stat. 1141 (1958); P.L. 87-583, 76 Stat. 381 (1962); P.L. 89-358, § 8, 80 Stat. 27 (1966); P.L. 93-82, § 102, 87 Stat. 180 (1973). See also 38 C.F.R. § 17.47 (1976). Congress in 1976 eliminated the male pronouns and substituted gender-neutral terms. 38 U.S.C. § 610 (Supp. 1977).

medical expenses resulting from [Adams'] injury — no exception." The carrier paid the private hospital bill but refused to pay the Veterans Administrations' claim. The Board then ordered payment. On the carrier's petition for review, removed by the Government from the state court, the district court entered judgment for the carrier. The Government's appeal to this Court ensued.

The Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8306, § 7 (Vernon Supp. 1976-1977),² provides that an employee shall have the sole right to select or choose the persons or facilities to furnish medical aid, chiropractic services, hospital services, and nursing in connection with a job-related injury covered by the Act, "and the Association shall be obligated for same." The clear import of the statute is that the employer shall be liable to the employee for medical expenses incurred in the treatment of a compensable injury. There is no question in the instant case regarding the Act's coverage of the injury in question. Nor is there any question as to the private hospital's entitlement to the costs incurred for surgery and treatment. The Texas courts, discussing the predecessor statute, have held that a private physician and hospital that render medical services to an injured employee have a right to recover the costs incurred from the compensation carrier. *Maryland Casualty Co. v. Hendrick Memorial Hospital*, 169 S.W. 2d 965 (Tex. Civ. App. — Eastland 1942), *aff'd*, 141 Tex. 23, 169 S.W.2d 969 (1943); *Texas Employers' Insurance Ass'n v. Herron*, 29 S.W.2d 524 (Tex. Civ. App. — Waco 1930), *writ dismissed*).

² Tex. Rev. Civ. Stat. Ann. art. 8306, § 7 (Vernon Supp. 1976-77) provides: The employee shall have the sole right to select or choose the persons or facilities to furnish medical aid, chiropractic services, hospital services, and nursing and the association shall be obligated for same or, alternatively, at the employee's option, the association shall furnish such medical and . . . as may be reasonably required at the time of the injury and at any time thereafter to cure and relieve from the effects naturally resulting from the injury.

The only questions presented here are whether the employee can recover the cost of medical care that would have been furnished free by the V.A. hospital, but for the compensation coverage; and, if so, whether the Government is entitled to subrogation to the employee's rights, having taken an assignment pursuant to 38 C.F.R. § 17.48(d) (1976).³ Based on the general purpose of the Texas Workmen's Compensation Act, which is not unlike the purpose of the federal Longshoremen's Compensation Act, and on our opinion in *United States v. Bender Welding & Machine Co.*, ___ F.2d ___, Docket Nos. 76-1770, 76-1916, decided with this case, we hold that the Government should be reimbursed by the compensation carrier for the medical expenses incurred.

[1] Motivating the enactment of the Texas Workmen's Compensation Act was the broad economic theory that industrial accident costs should be chargeable to the industries as part of their overhead expenses. *Southern Surety Co. v. Inabnit*, 1 S.W.2d 412 (Tex.Civ.App. — Eastland 1927, *no writ*); *Employers Mutual Liability Insurance Co. v. Konvicka*, 197 F.2d 691 (5th Cir. 1952). The Texas courts have consistently held

³ 38 C.F.R. § 17.48(d) (1976) provides in part:

(d) Persons hospitalized pursuant to paragraph . . . (d) . . . of § 17.47, who it is believed may be entitled to hospital care or medical or surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

(1) . . . (iii) "Workmen's Compensation" or "employer's liability" statutes, State or Federal; . . . or

(2) By reason of statutory or other relationships with third parties, including those liable for damages because of negligence or other legal wrong; will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties, referred to in paragraph (d)(1) . . . of this section, are, or will become liable. Such patients will be requested to execute an appropriate assignment as prescribed in this paragraph. Patients who, it is believed, may be entitled to care under any one of the plans in paragraph (d)(1) of this section, will be requested to execute VA Form 10-2381, Power of Attorney and Agreement. . . . Notice of this assignment will be mailed promptly to the party or parties believed to be liable. When the amount of charges is ascertained, bill therefor will be mailed to such party or parties.

that the compensation laws should be liberally construed to further the remedial purposes for which they were enacted. *Travelers Insurance Co. v. Adams*, 407 S.W.2d 282 (Tex. Civ. App. — Texarkana 1966, *writ ref'd n.r.e.*).

[2] The Veterans' Benefits Act, on the other hand, was intended to authorize free hospital care for non-service-connected injuries only to those veterans unable to defray the necessary medical costs. The Act was not intended to relieve an employer of his statutory duty of compensating an injured employee for the expenses incurred in the treatment of a job-related injury.

[3] Effectuation of the purposes of both statutes requires a holding that the injured employee should be able to recover from the compensation carrier the costs of medical care furnished by the Veterans Administration. A contrary holding would be a windfall to the insurance carrier merely because the employee was a veteran able to obtain care at a V.A. hospital, and would be inconsistent with the right of recovery afforded a private hospital. No valid reason appears for drawing a distinction between the two, where the employee has been billed. Nor does a valid reason appear for burdening the Government with the costs of a job-related injury, which should more appropriately be borne by the employer.

REVERSED.

APPENDIX E

The UNITED STATES of America, the Veterans
Administration and Director, Office of Workmen's
Compensation Programs, United States Dept. of Labor,
Petitioners,

v.

BENDER WELDING & MACHINE CO.
and American Mutual Liability Insurance Co.,
Respondents.

The UNITED STATES OF AMERICA, the Veterans Admini-
stration and Director, Office of Workmen's Compensation
Programs, United States Department of Labor,
Petitioners,

v.

BENDER WELDING & MACHINE CO.
and American Mutual Liability Insurance Co.,
Respondents.

No. 76-1770, 76-1916.

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1977.

Petitions for Review of Orders of the Benefits Review Board,
Department of Labor (Alabama Cases).

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

These two consolidated cases present the common legal question

of whether the United States can recover the cost of medical care provided through a Veterans Administration hospital to disabled or injured veteran-employees covered by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901 *et seq.* The Benefits Review Board denied recovery. We reverse on the ground that the Government, to which the employees had voluntarily assigned their compensation claims, was by subrogation entitled to reimbursement for the expense of medical services furnished the employees.

The facts of the two cases are similar. In both cases, veteran-employees, who worked as sandblasters for respondent Bender Welding & Machine Company, a maritime employer subject to the Longshoremen's and Harbor Workers' Compensation Act, were hospitalized in V.A. hospitals for treatment of job-related non-service-connected disabilities. Both signed statements prior to admission verifying that they were veterans and were "unable to defray the expenses of necessary hospital care."¹ Upon subsequent discovery of each employee's eligibility for compensation benefits, the hospital billed the employees for the cost of medical care, and took from both assignments of their medical expense recovery rights under the Longshoremen's and Harbor Workers' Compensation Act.²

¹ Until amendment in 1976, the Veterans' Benefits Act provided in pertinent part:
(a) The Administrator, within the limits of Veterans' Administration facilities, may furnish hospital care or nursing home care which he determines is needed to
(1) * * *

(B) any veteran for a non-service-connected disability if [he] is unable to defray the expenses of necessary hospital or nursing home care.

Veterans' Benefits Act of 1957, P.L. 85-56, § 510, 71 Stat. 111, *as amended* P.L. 85-857, 72 Stat. 1141 (1958); P.L. 87-583, 76 Stat. 381 (1962); P.L. 89-358, § 8, 80 Stat. 27 (1966); P.L. 93-82, § 102, 87 Stat. 180 (1973). *See also* 38 C.F.R. § 17.47 (1976). *Congress in 1976 eliminated the male pronouns and substituted gender-neutral terms.* 38 U.S.C.A. § 610 (Supp. 1977).

² The assignment, VA Form 10-2381, provided in part:

For a valuable consideration I hereby assign to the Administrator of Veterans Affairs and his successors in such Office, to the extent herein indicated, all claims, demands, entitlements, judgments, administrative awards, and the proceeds thereof, and all causes of action which I now have, and which I

It is undisputed that the Longshoremen's Act imposes a duty upon the employer to pay the reasonable cost of medical care furnished to the employees for these job-related disabilities or injuries. 33 U.S.C.A. § 901(a), 907(a). Had the medical care been furnished by non-Veterans Administration hospitals, there would presumably be no resistance to payment therefor by the employers or their insurance carriers. Recovery was denied simply because the expenses would have been paid to the Veterans Administration, which provided the care that would have otherwise been provided by "compensable" hospitals.

The fundamental point which controls this decision is whether Congress, in establishing the criteria for veterans' hospital care by the Government, has authorized the Veterans Administration to recover for such services from a workmen's compensation carrier. Although no legislation specifically answers this question, an appropriate understanding of the Veterans' Benefit Act as juxtaposed against the purpose and provisions of the Longshoremen's and Harbor Workers' Compensation Act leads to the conclusion that recovery is authorized. The key to the decision is an appreciation of the fact that the Veterans Administration is not required to provide free medical care to a

may have hereafter, by reason of any liability of third parties entitling me to hospital care, or medical or surgical treatment, or to reimbursement for all or part of the cost of any such; or recovery of damages for all or part thereof:

(a) based on contract, partially enumerated here as (1) membership in a union, fraternal or other organization; (2) rights, under a group hospitalization plan or under any insurance contract or plan which provides for payment or reimbursement for the cost of medical or hospital care.

(b) based on statute, State or Federal (other than P.L. 87-693, 76 Stat. 593), and regulations promulgated pursuant thereto, partially enumerated here as (1) "workmen's compensation" statutes; (2) "employer's liability" statutes; (3) right to "maintenance and cure" in admiralty.

The extent of this assignment is an amount equal to the total reasonable charges for hospital care, medical, surgical, and clinical treatment, or any of them, including ambulance transportation and other auxiliary services received by me. This assignment does not include any sums to which I am entitled on a fixed basis which do not depend upon the amount incurred or disbursed by me for such care; (sometimes referred to in the insurance business as a right to indemnity).

veteran unless "[he] is unable to defray the expenses of necessary hospital care." If compensation coverage is treated as giving an employee the ability to defray expenses, it necessarily follows that medical services need not have been rendered by the Government without charge. If the services provided by the Veterans Hospital are not free, they would become a proper obligation of the compensation carrier to the employee.

[1,2] The Longshoremen's and Harbor Workers' Compensation Act has as its general purpose the distribution of economic loss sustained by employees and their dependents as a result of personal injuries incurred in the course of employment to the industries and ultimately to the consuming public served by such employees. *West Penn Sand & Gravel Co. v. Norton*, 95 F.2d 498 (3d Cir. 1938). See also H.R. Rep. No. 1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4699. Although the compensation carrier would not be liable for any free services rendered the employee, it must pay for services which were not free.

[3] The relevant Veterans' Benefits Act authorizes the Veterans Administration to provide hospital care to "any veteran for non-service-connected disability if [he] is unable to defray the expenses of necessary hospital or nursing home care." Veterans Health Care Expansion Act of 1973, P.L. 93-82, § 102, 87 Stat. 179 (current version at 38 U.S.C.A. § 610(a)(1)(B) (Supp. 1977)). Pursuant to the Veterans' Benefits Act of 1957, P.L. 85-56, § 521, 71 Stat. 113 (current version at 38 U.S.C.A. § 621 (Supp. 1977)), the Administrator has promulgated regulations which state that persons admitted to a V.A. hospital on this basis, who are entitled to reimbursement for medical care by reason of a state or federal workmen's compensation statute, will not be furnished medical care without charge to the extent that they are entitled to

reimbursement. 38 C.F.R. § 17.48(d)(1976).³ The Act fulfills a congressional purpose of providing free hospital services to veterans who have suffered non-service-connected disabilities and who are unable to pay for hospital care, in consideration for their prior service to their country. To include veterans legally entitled to the provisions of hospital care by third parties would be inconsistent with Congress' exclusion of those veterans who would otherwise be able to "defray the expense" of hospital care.

[4] Nothing in the Veterans' Benefits Act indicates that Congress intended to relieve an employer of his statutory responsibility for providing medical treatment to his injured employees. See *Marshall v. Rebert's Poultry Ranch & Egg Sales*, 268 N.C. 233, 150 S.E.2d 423 (1966). The wisdom of this plan is apparent. To allow a compensation carrier to escape liability merely because the injured employee was a veteran treated at a V.A. hospital, rather than a private hospital, would be a windfall to the carrier, which has been paid a premium by the employer to cover this employee. The V.A. hospital has incurred expenses in treating the employee whom it was not obligated to treat, and

³ 38 C.F.R. § 17.48(d) (1976) provides in part:

(d) Persons hospitalized pursuant to paragraph ... (d) ... of § 17.47, who it is believed may be entitled to hospital care or medical or surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

(1) ... (iii) "Workmen's Compensation" or "employer's liability" statutes, State or Federal; ... or

(2) By reason of statutory or other relationships with third parties, including those liable for damages because of negligence or other legal wrong; will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties, referred to in paragraph (d)(1) ... of this section, are, or will become liable. Such patients will be requested to execute an appropriate assignment as prescribed in this paragraph. Patients who, it is believed, may be entitled to care under any one of the plans in paragraph (d)(1) of this section, will be requested to execute VA Form 10-2381, Power of Attorney and Agreement. ... Notice of this assignment will be mailed promptly to the party or parties believed to be liable. When the amount of charges is ascertained, bill therefor will be mailed such party or parties.

should not have to absorb the cost. Charging a veteran for the medical care costs that he is entitled to receive from a workmen's compensation carrier violates the purpose of neither statute.

[5] Where the Veterans Administration has taken a voluntary assignment of a veteran-employee's compensation claim, as prescribed by the regulations, 38 C.F.R. § 17.48, it is entitled to recover the medical care cost as a subrogee of the employee's rights.

This holding is consistent with this Court's decision in *Pennsylvania National Mut. Cas. Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971). There we sustained the workmen's compensation insurance carrier's position that the V.A. hospital's recovery for medical treatment rendered an injured employee was, by regulation, conditioned upon the procurement of an assignment.

Although we need not address the third-party beneficiary claims of the Government, we note the analogy between this decision and the third-party beneficiary cases in which the Government has been allowed reimbursement from a liability insurer for the cost of medical care provided to an injured veteran. See, e.g., *United States v. Automobile Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975); *United States v. United Services Automobile Ass'n*, 431 F.2d 735 (5th Cir. 1970); *United States v. Government Employees Ins. Co.*, 461 F.2d 58 (4th Cir. 1972); *United States v. State Farm Mutual Automobile Ins. Co.*, 455 F.2d 789 (10th Cir. 1972).

[6] *United States v. Standard Oil of California*, 322 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947), was not a subrogation case, and reliance on the denial of recovery to the Government in that case is misplaced. In *Standard Oil* the Supreme Court held that, in the absence of legislation providing a right of recovery, the Government could not recover from a tort-feasor amounts

expended for an injured soldier's hospitalization and for his compensation paid during disability. The injured soldier had previously accepted payment from the tort-feasor's insurer and executed a release. The case dealt only with the Government's independent right of recovery against the tort-feasor. The court noted expressly

[t]he Government's claim, of course, is not one for subrogation. It is rather for an independent liability owing directly to itself as for deprivation of the soldier's services and "indemnity" for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by appellants. . . . It is, in effect, for tortious interference by a third person with the relation between the Government and the soldier and consequent harm to the Government's interest, rights and obligations in that relation, not simply to subrogation to the soldier's rights against the tort-feasors.

332 U.S. at 304, n. 5, 67 S.Ct. at 1606 (citation omitted). Here the Government seeks no independent right of recovery, but only subrogation through voluntary assignments to the rights of the injured veteran-employees. There is no chance of double liability, as was the case in *Standard Oil*. The assignments operate to divest the veteran-employees of any rights they might have for the hospital cost and medical care. See *United States v. Kirkland*, 405 F.Supp. 1024 (E.D. Tenn., 1976). *Standard Oil* does not preclude the Government's subrogation to a veteran-employee's rights for workmen's compensation.⁴

⁴ It is noted that Congress responded to *Standard Oil* by enacting the Medical Care Recovery Act, 42 U.S.C.A. § 2651. See S.Rep. No. 1945, 87th Cong., 2d Sess., reprinted in [1962] U.S.Code Cong. & Ad.News, 2637, 2637-39. That Act allows the United States to recover from a tort-feasor the reasonable value of care furnished to an injured soldier or veteran. The statute further provides that the Government shall be subrogated to any right or claim that the individual shall have against the tort-feasor to the extent of that right or claim. Although the statute is limited in operation to tort claims, See *Pennsylvania National Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971), and is inap-

[7] In both of these cases, defendants seek to dismiss the petitions for review on the ground that the Government was not a proper party to seek review of the Board's decision because it did not participate in the proceedings before the Administrative Law Judge or the Benefits Review Board.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 921(c) (Supp. 1977), provides that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred. . . ." The statute speaks not in terms of "parties" but in terms of "person[s] adversely affected or aggrieved." The Government was aggrieved by the Board's ruling which expressly held that neither the employee nor the Veterans Administration was permitted to recover the costs of care furnished by the V.A. hospital. With respect to the employee's claim for costs incurred at the V.A. hospital, the Government was in fact the real party in interest. The claimant himself had nothing to gain or lose by the Board's decision as to these costs, for he was required to pay the Veterans Administration only to the extent he was entitled to reimbursement by reason of workmen's compensation. 38 C.F.R. § 17.48(d) (1976). Only the Veterans Administration and the compensation carrier were affected by the decision. This is unlike a situation where an employee incurred costs for which he

plicable to the instant case, it does indicate a congressional policy favoring recovery by the Government through subrogation to the rights of the injured person in damages for the care and treatment furnished. *Id.* at 2640-2641. In a letter addressed to the Chairman of the House Committee on the Judiciary, the Administrator of Veterans Affairs commended on this proposed legislation:

The Veterans' Administration has had in effect for many years regulations which provide for the taking of an assignment of the veteran's rights to the extent of the cost of non-service-connected hospital and medical care furnished by this agency for which third parties are, or may become, liable. . . .

Enactment of the bill will strengthen our position in this area and ensure more uniform recognition by the courts of our right of action . . . *Id.* at 2651.

would be liable to the hospital whether or not he could recover from the compensation carrier. Under these circumstances, the Government was a "person adversely affected or aggrieved" by the Board's order and has standing to petition for review in this Court. The motion to dismiss is therefore denied.

The judgments of the Benefits Review Board are reversed, and the cases are remanded for entry of awards in favor of the Government.

REVERSED AND REMANDED.

APPENDIX F

Texas Employers' Insurance Association,
Plaintiff-Appellee,

v.

United States of America,
Defendant-Appellant.

No. 76-2056.

United States Court of Appeals,
Fifth Circuit.

March 16, 1978.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

[1,2] The panel held that the United States can recover from the Texas Employers' Insurance Association the cost of medical services provided through a Veterans Administration hospital to an injured veteran-employee covered by the Texas Workmen's Compensation Act, Texas Rev.Civ.Stat.Ann. arts. 8306-8309 (Vernon 1967). A companion case, *United States v. Bender Welding & Machine Co.*, 558 F.2d 761 (5th Cir. 1977), allowed a similar recovery against an employer under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 *et seq.*

Explicitly in *Bender*, and implicitly in this case, we relied on the

employee's assignment to the Veterans Administration of his rights against the compensation carrier. See 558 F.2d at 764-765. A Veterans Administration regulation, 38 C.F.R. § 17.48(d) (1976), expressly authorizes the assignment. The Association argues that Texas Rev. Civ. Stat. art. 8306, § 3 (Vernon 1967) makes such an assignment void. See *Texas Employers' Insurance Association v. United States*, 390 F.Supp. 142, 149-150 (N.D. Texas 1975); *Lively v. Blue Cross Hospital Service, Inc.*, 488 S.W. 2d 474 (Tex.Civ.App. 1972) (no writ).

State law, however, does not control this case. The Veterans Administration promulgated § 17.48(d) under its statutory rulemaking power, 38 U.S.C.A. §§ 210(c), 621. The regulation has the force of federal law. Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, a state may not condition a workmen's compensation scheme in a manner which frustrates the purpose of a national statute. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967) (denial of benefits for filing unfair labor practice charge conflicts with National Labor Relations Act).

Application of the federal regulation here is but a minor trespass on the state scheme. See *United States v. Kirkland*, 405 F.Supp. 1024, 1030 (E.D. Tenn. 1975). The purpose of prohibiting assignments is to protect employees against the improvident distribution of benefits meant to sustain them during their period of disability and to protect them against old creditors' claims. This assignment does not apply to any compensation benefits except those based on the reasonable charges for health care incurred. It operates to the benefit of the injured worker because it allows the Veterans Administration to give treatment first and worry later about whether the worker was entitled to free care because of inability to defray the costs, 38 U.S.C.A. § 610.

Also, the assignee here is the Government, not a private party. A recognized maxim of statutory construction is that "[a] general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States v. Wittek*, 337 U.S. 346, 358-359, 69 S.Ct. 1108, 1114, 93 L.Ed. 1406 (1949); see *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976). In the federal context, this maxim explains why the anti-assignment provision in the Longshoremen's Act, 33 U.S.C.A. § 916, does not bar application of § 17.48(d). Several state courts have reached a similar conclusion in construing state anti-assignment laws. *Annot.*, 31 A.L.R. 3d 532, 544 (collecting cases).

PETITION DENIED.

APPENDIX G

VETERANS' BENEFITS 38 § 210

[See main volume for text of (b)]

(c) (1) The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith, including regulations with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws, the forms of application by claimants under such laws, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards.

APPENDIX H

VETERANS' BENEFITS 38 § 610

SUBCHAPTER II — HOSPITAL, NURSING HOME, OR
DOMICILIARY CARE AND MEDICAL TREATMENT

§ 610. Eligibility for hospital, nursing home, and domiciliary care

(a) The Administrator, within the limits of Veterans' Administration facilities, may furnish hospital care or nursing home care which the Administrator determines is needed to—

(B) any veteran for a non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital or nursing home care;

APPENDIX I

VETERANS' BENEFITS 38 § 622

SUBCHAPTER III — MISCELLANEOUS PROVISIONS
RELATING TO HOSPITAL AND NURSING HOME CARE
AND MEDICAL TREATMENT OF VETERANS

§ 621. Power to make rules and regulations

The Administrator shall prescribe—

- (1) such rules and procedure governing the furnishing of hospital, nursing home, and domiciliary care as the Administrator may deem proper and necessary;
- (2) limitations in connection with the furnishing of hospital, nursing home and domiciliary care; and
- (3) such rules and regulations as the Administrator deems necessary in order to promote good conduct on the part of persons who are receiving hospital, nursing home, or domiciliary care in Veterans' Administration facilities.

APPENDIX J

CHAPTER 32.—THIRD PARTY LIABILITY FOR
HOSPITAL AND MEDICAL CARE

Sec.

2651. Recovery by United States.

- (a) Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment.
- (b) Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings.
- (c) Veterans' exception.

2652. Regulations.

- (a) Determination and establishment of reasonable value of care and treatment.
- (b) Settlement, release and waiver of claims.
- (c) Damages recoverable for personal injury unaffected.

2653. Limitation or repeal of other provisions for recovery of hospital and medical care costs.

§ 2651. Recovery by United States — Conditions, exceptions; persons liable; amount of recovery; subrogation; assignment.

- (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances *creating a tort liability* upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have the right to recover from said third person the reasonable value of the care and treatment so

furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

Enforcement procedure; intervention; joinder of parties;
State or Federal court proceedings

(b) The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents or survivors.

Veterans' exception

(c) The provisions of this section shall not apply with respect to hospital, medical, surgical or dental care and treatment (including prostheses and medical appliances) furnished by the

Veterans' Administration to an eligible veteran for a service-connected disability under the provisions of chapter 17 of Title 38.

§ 2652. Regulations — Determination and establishment of reasonable value of care and treatment

(a) The President may prescribe regulations to carry out this chapter, including regulations with respect to the determination and establishment of the reasonable value of the hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished or to be furnished.

Settlement, release and waiver of claims

(b) To the extent prescribed by regulations under subsection (a) of this section, the head of the department or agency of the United States concerned may (1) compromise, or settle and execute a release of, any claim which the United States has by virtue of the right established by section 2651 of this title; or (2) waive any such claim, in whole or in part, for the convenience of the Government, or if he determines that collection would result in undue hardship upon the person who suffered the injury or disease resulting in care or treatment described in section 2651 of this title.

Damages recoverable for personal injury unaffected

(c) No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder.

Pub.L. 87-693, § 2, Sept. 25, 1962, 76 Stat. 593.

§ 2653. Limitation or repeal of other provisions for recovery of hospital and medical care costs

This chapter does not limit or repeal any other provision of law providing for recovery by the United States of the cost of care and treatment described in section 2651 of this title.

Pub.L. 87-693, § 3, Sept. 25, 1972, 76 Stat. 594.

APPENDIX K

Art. 8306, sec. 3. Exclusiveness of remedy; exception of compensation from legal process; assignability; recovery from third persons; liability of subscriber

Sec. 3. The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void. If an action for damages or account of injury to or death of an employee of a subscriber is brought by such employee, or by the representatives or beneficiaries of such deceased employee, or by the association for the joint use and benefit of itself and such employee or such representatives or beneficiaries, against a person other than the subscriber, as provided in Section 6a, Article 8307, Revised Civil Statutes of Texas, 1925, and if such action results in a judgment against such other person, or results in a settlement by such other person, the subscriber, his agent, servant or employee, shall have no liability to reimburse or hold such other person harmless on such judgment or settlement, nor shall the subscriber, his agent, servant or employee, have any tort or contract liability for damages to such other person because of such judgment or settlement, in the absence of a written agreement expressly

assuming such liability, executed by the subscriber prior to such injury or death. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber or any third party.

The Association, its agent, servant or employee, shall have no liability with respect to any accident based on the allegation that such accident was caused or could have been prevented by a program, inspection, or other activity or service undertaken by the association for the prevention of accidents in connection with operations of its subscriber; provided, however, this immunity shall not affect the liability of the association for compensation or as otherwise provided in this law. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber, or any third party. Acts 1917, p. 269; Acts 1923, p. 385; Acts 1963, 58th Leg., p. 1132, ch. 437, § 1.

Complete Text of Article 8306, see pp. 10-39.

APPENDIX L

§17.48 Title 38—Pensions, Bonuses, and Veterans' Relief

(d) Persons hospitalized pursuant to paragraph (c)(1), (d) or (f) of § 17.47, who it is believed may be entitled to hospital care or medical or surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

(1)(i) Membership in a union, fraternal or other organization; (ii) rights under a group hospitalization plan, or under any of the prepay medical care or insurance contracts or plans which provide for payment or reimbursement in whole or in part, for the cost of medical or hospital care, and conditions the obligation of the insurer to pay upon payment or incurrence of liability by the person covered; (iii) "Workmen's Compensation" or "employer's liability" statutes, State or Federal; and (iv) right to maintenance and cure in admiralty; or

(2) By reason of statutory or other relationships with third parties, including those liable for damages because of negligence or other legal wrong;

will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties, referred to in paragraph (d) (1) or (2) of this section, are, or will become liable. Such patients will be requested to execute an appropriate assignment as prescribed in this paragraph. Patients who, it is believed, may be entitled to care under any one of the plans in paragraph (d) (1) of this section, will be requested to execute VA Form 10-2381, Power of Attorney and Agreement. Those patients who, it is believed, may be entitled to hospital care under the circumstances prescribed in paragraph (d) (2) of this section will be requested to complete VA Form 2-4763, Power of Attorney and Assignment. Notice of this assignment will be mailed promptly to the party or parties believed to be liable. When the amount of charges is ascertained, bill therefor will be mailed such party or parties.

APPENDIX M

In The United States District Court
For The Northern District of Illinois
Eastern Division
No. 73-C-2424

United States of America,

Plaintiff,

vs.

Chicago White Metal Casting Company,

Defendant.

MEMORANDUM OPINION

This is an action by the United States under an assignment in its favor and the Medical Care Recovery Act, 42 U.S.C. §2651 *et seq.*, to recover the *reasonable value of medical services* and hospitalization rendered to Monroe Banks, a veteran of the United States armed forces. The complaint alleges that Banks was injured during the course of his employment with the Chicago White Metal Casting Company. A settlement contract entered into by Banks and the Company in compromise of an award rendered by an arbitrator, and approved by the Industrial Commission of Illinois, pursuant to the Workmen's Compensation Act of that state, Ill.Rev.Stat. ch. 48, §1138.1 *et seq.*, contained an award of \$5,778.88 for medical expenses.¹ Banks assigned to the Administrator of Veterans Affairs all his

¹ The settlement reads as follows:

"Respondent has offered and petitioner has agreed to accept the sum of \$18,448.88 in a LUMP SUM for 60% loss of use of the left leg, 30% loss of use of the right leg, plus disputed T.T. and medical (which is a compromise of the award rendered by the Arbitrator) in full, final and complete settlement for any and all claims of any kind, nature and description, including medical expenses or unknown injuries which allegedly resulted from said accident. Review under Section 19(M) is hereby specifically waived."

rights and interest in and to the settlement award to the extent of the aforementioned medical care. By virtue of this assignment, the defendant is alleged to be indebted to the federal government in the amount of \$4,787.00, the cost of the services provided by the Veterans Administration. Jurisdiction in this court is based upon 28 U.S.C. §1345. The matter is presently before the court upon the defendant's motion to dismiss and the government's motion for summary judgment on the issue of liability.

In essence, the Medical Care Recovery Act provides that whenever the United States is required to furnish medical and related care to a person "injured under circumstances creating a tort liability" in a third person, the government shall have a right of recovery from said third party for the reasonable value of the services so furnished. As to this right, the United States is subrogated to any right or claim which the disabled beneficiary has against the third person. Further, the agency or department head concerned may require the beneficiary to assign the claim or cause of action to which the government is subrogated.²

Prior to the enactment of this litigation, it had been the practice of the Veterans Administration to take an assignment of

² 42 U.S.C. § 2651(a) states:

"In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of the Act, under circumstances creating a *tort liability upon some third person* (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim."

a veteran's rights to the extent of the costs of non-service-connected medical and hospital care, furnished by the Administration, for which third parties were, or might become, liable.³ See *United States v. St. Paul Mercury Indemnity Co.*, 1113 F.Supp. 726, 733-34 (D.Neb. 1955), *aff'd.*, 238 F.2d 594 (8th Cir. 1956). The regulations establishing this procedure⁴ are based upon the authority of the Administrator of Veterans Affairs to make necessary rules and regulations, 38 U.S.C. §210(c), and to prescribe rules, procedures and limitations concerning hospital care, *id.*, §621.⁵ See 1962 U.S. Code of Cong. & Adm. News 2651.

It is unclear whether plaintiff bases its theory of recovery upon the assignment under 38 C.F.R. §17.48(d) exclusively or in tandem with the right of recovery conferred upon the government by the Medical Care Recovery Act.⁷ Since, in this court's opinion, *the action may be maintained under the assignment alone*, the question whether the Act supports this suit need not be reached.

³ The present regulation reads in pertinent part:

"Persons hospitalized . . . who it is believed may be entitled to hospital care or medical or surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

"(iii) 'Workmen's Compensation' or 'employer's liability' statutes, State or Federal . . .

. . . will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties . . . are, or will become liable. Such patients will be requested to execute an appropriate assignment. . . ."

38 C.F.R. § 17.48(d).

⁴ See note 3 *supra*.

⁵ "The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans' Administration and are consistent therewith." 38 U.S.C. § 210(c).

⁶ "The Administrator shall prescribe—

(1) such rules and procedure governing the furnishing of hospital and domiciliary care as he may deem proper and necessary;

(2) limitations in connection with the furnishing of hospital and domiciliary care; . . . " 38 U.S.C. § 621.

⁷ Under the Act, however, no assignment is necessary for the United States to institute suite.

In support of its motion to dismiss, defendant claims that (1) benefits under the Illinois Workmen's Compensation Act are not assignable⁸, (2) no final award has been entered by the Industrial Commission, (3) the assignment is invalid for lack of consideration, and (4) the Administrator of Veterans Affairs has no authority to take an assignment from a veteran for medical and hospital care.

The Administrator of Veterans Affairs has been granted broad statutory authority to promulgate regulations "necessary or appropriate" to carry out the laws administered by the Veterans Administration. 38 U.S.C., §210(c); see *id.* §1621. Pursuant to that authority, the Administrator has promulgated the regulation contained at 38 C.F.R. §17.48(d).⁹ Such a regulation is clearly within the authorization, see *Higley v. Schlessman*, 1292 P.2d 411, 416-17 (Okla. 1956), and therefore, valid, with the force and effect of law. See *e.g.*, *Gowanda Coop. Savings & Loan Ass'n. v. Gray*, 183 F.2d 367 (2d Cir. 1950); *Big Four Oil & Gas Co. v. United States*, 118 F.Supp. 958 (W.D. Pa. 1954). Thus, to the extent that Illinois law purports to prohibit the assignment in question,¹⁰ the federal regulation takes precedence under the supremacy clause of the United States Constitution.

Defendant's second contention is refuted by its accurate statement of the rule that "a lump sum settlement contract, when . . . approved by the Commission, has the same force and effect as an award, and as such is a final adjudication . . ." See *Dyer v. Industrial Comm'n*, 364 Ill. 161 (1936), *cert. denied*, 300 U.S. 661 (1937).

⁸ The Illinois Workmen's Compensation Act provides that "[n]o payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages." Ill.Rev.Stat. ch. 48, § 138.21.

⁹ See note 3 *supra*.

¹⁰ See note 7 *supra*.

Finally, since the assignment is validly required by law the fact that it may not be supported by consideration of traditional contract principles is irrelevant.

Thus, Banks' assignment to the United States of all his rights and interest in and to the instant award to the extent of the cost of the aforementioned medical and hospital services is valid and the government may properly institute a cause of action thereon.

The ability of the United States to institute an action on the assignment on behalf of the Veterans Administration without reference to the Medical Care Recovery Act¹¹ is supported by the legislative history of that statute and by the opinion of the United States Court of Appeals for the Fifth Circuit in *Pennsylvania Nat'l Mutual Cas. Ins. Co. v. Barnett*, 445 F.2d 573 (5th Cir. 1971). The Senate Report on the legislation noted, with respect to section 1(a), now codified at 42 U.S.C. §2651(a), that "[t]he practice of securing such assignments is currently followed by the Veterans' Administration in its program of recovering the costs of care and treatment." 1962 U.S. Code of Cong. & Adm. News 2640-41. Commenting upon the provisions eventually codified at 42 U.S.C. §2651(c),¹² the Report stated:

"It is the present policy of the Veterans' Administration, under broad regulatory power conferred in the Veterans' Benefits Act to recover its cost of treating injured veterans in negligent third-party cases where the disability is not service connected. This language makes it clear that the present situation is to continue . . . " 1962 U.S. Code of

¹¹ The assignment specifically excludes any claims which the assignor may have based on the Medical Care Recovery Act.

¹² 42 U.S.C. § 2651(c) provides:

"The provisions of this section shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by Veterans' Administration to an eligible veteran for a service-connected disability under the provisions of chapter 17 of Title 38.

Cong. & Adm. News 2641-42.¹³

Indirect support for the instant result is also found in *Barnett, supra*. In that case, a workmen's compensation carrier of an injured veteran's employer brought suit to set aside an award of the Texas Accident Board which directed payment of workmen's compensation benefits to Barnett, the injured veteran, and to the United States on behalf of the Veterans Administration. A compromise settlement was reached with Barnett, and, after hearings, judgment was entered in favor of the government on its claim. The court of appeals reversed the latter on a number of grounds. Most importantly for purposes of this case, the court noted that 38 C.F.R. §17.48(d) did not apply "in the absence of an assignment and none was made by Barnett." 445 F.2d at 575. The court agreed with the carrier that "any right of the Veterans Administration to recover was conditioned upon the procurement of an assignment pursuant to the regulation." *Id.* at 574. Implicit in these statements is the proposition that had the

¹³ In a letter addressed to the Chairman of the House committee on the Judiciary, the Administrator of Veterans Affairs made the following statement in regard to the proposed legislation:

"The Veterans' Administration has had in effect for many years regulations which provide for the taking of an assignment of the veteran's rights to the extent of the cost of non-service-connected hospital and medical care furnished by this agency for which third parties are, or may become liable. These regulations rest on the Administrator's general authority to make necessary rules and regulations (38 U.S.C. 210(c)) and his more specific authority to prescribe rules, procedures, and limitations relating to the furnishing of hospital and domiciliary care (38 U.S.C. 621).

"Enactment of the bill will strengthen our position in this area and insure more uniform recognition by the courts of our right of action. We are in full accord with the purpose of H.R. 298 and are pleased to recommend its favorable consideration by the committee." 1962 U.S. Code of Cong. & Adm. News 2651.

DATED: January 16, 1974

¹⁴ The court also rejected the Medical Care Recovery Act as a basis for the cause of action, remarking that the "statute only applies in tort situations and does not apply where the source of the claim is workmen's compensation." 445 F.2d at 575. There seems to be some question whether 42 U.S.C. § 2651(a) would apply in the instant situation, compare *Pennsylvania Nat'l Mutual Cas. Ins. Co. v. Barnett*, *supra*, and *United States v. Gusto Dist. Co.*, 329 F.Supp. 578 (D.Mont. 1971), with *United States v. Moore*, 469 F.2d 788 (3d Cir. 1972), *cert. denied*, 411 U.S. 905 (1973).

INDUSTRIAL ACCIDENT BOARD CUE D. BOYKIN JAMES T. SPARKS J. J. McCUAN
CHAIRMAN MEMBER MEMBER

No. 77-1657

Supreme Court, U. S.

FILED

JUN 28 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A-9 to A-13) is reported at 558 F. 2d 766. The opinion of the court of appeals on petition for rehearing (Pet. App. A-23 to A-25) is reported at 569 F. 2d 874. The opinions of the district court (Pet. App. A-3 to A-8) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. A timely petition for rehearing was denied on March 16, 1978. The petition for a writ of certiorari was filed on May 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States may recover from a workers' compensation insurance carrier the reasonable cost of medical care provided by the Veterans Administration to an injured employee, who was covered by state workers' compensation at the time of the accident and who assigned his compensation claim to the United States.

STATUTES AND REGULATIONS INVOLVED

1. Pertinent portions of the Veterans' Benefits Act of 1958, as amended, 38 U.S.C. (and Supp. V) 101 *et seq.*, of 38 C.F.R. 17.48(d), and of Section 3 of the Texas Workmen's Compensation Act (Tex. Rev. Civ. Stat. Art. 8306 (1967)) are reproduced at Pet. App. A-26 to A-35.

2. 38 C.F.R. 17.47 provides in relevant part:

Within the limits of Veterans Administration facilities, hospital, domiciliary, or nursing home care may be furnished the following applicants.

* * * * *

(d) Hospital or nursing home care for any veteran[s] * * * provided they swear they are unable to defray the expense of hospital * * * care, and who are suffering from a disability, disease, or defect which, being susceptible to cure or decided improvement, indicates need for hospital care * * *.

3. Section 7 of the Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Art. 8306 (1978 Cum. Supp.), provides in relevant part:

The employee shall have the sole right to select or choose the persons or facilities to furnish medical aid, chiropractic services, hospital services, and nursing and the [Texas Employers' Insurance] [A]ssociation shall be obligated for same or, alternatively, at the

employee's option, the association shall furnish such medical aid * * * as may reasonably be required at the time of the injury and at any time thereafter to cure and relieve from the effects naturally resulting from the injury.

STATEMENT

1. Henry H. Adams, a veteran, sustained a head injury while working at Affiliated Foods, Inc., which is subject to the Texas Workmen's Compensation Act (Pet. App. A-10). He was admitted to a Veterans Administration (VA) hospital and immediately transferred to a private hospital for surgery (App. 119).¹ A few days later Adams returned to the VA hospital, where he was treated until his discharge (Pet. App. A-10). The cost of the medical care provided or paid for by the VA was \$1,989.85 (App. 119).

Adams was admitted to the VA hospital under 38 U.S.C. (Supp. V) 610(a)(1)(B), as amended by Pub. L. 94-581, Section 202(d)(2), 90 Stat. 2855, which authorizes the VA to provide medical and hospital care to veterans with non-service-connected disabilities who are "unable to defray the expenses of necessary hospital or nursing home care." The VA later learned, however, that Adams was able to pay such expenses because he was covered by a workers' compensation plan. In such cases, the VA is authorized by 38 C.F.R. 17.48(d) to request and receive an assignment from the injured employee of his medical and hospital care recovery rights. The VA billed Adams for the cost of his care and received from him an assignment of his medical and hospital expense recovery rights (Pet. App. A-10).

¹"App." refers to the joint appendix filed in the court of appeals.

Shortly after the accident the Texas Industrial Accident Board approved a "compromise settlement agreement" between Adams and petitioner (the workers' compensation insurance carrier). Petitioner agreed to pay "all accrued hospital and medical expenses resulting from [Adams'] injury—no exception" (Pet. App. A-10 to A-11). In light of that agreement, the VA forwarded the assignment it had received from Adams, and its bill for \$1,989.85, to petitioner for payment (App. 118). Petitioner refused to pay the bill (App. 121). The VA applied to the Texas Industrial Accident Board for a ruling (App. 122), and the Board directed petitioner to pay the bill (App. 123). Instead of complying with that order, petitioner sought review of the order in a Texas state court, naming the United States as defendant (App. 103-107). The government removed the case to federal court and counterclaimed for \$1,989.85 (App. 108-110).

2. On cross-motions for summary judgment, the district court held that the United States is not entitled to recover from petitioner the reasonable cost of the care provided by the VA (Pet. App. A-3 to A-8). The court indicated that its holding was based on the view that the government was seeking to recover under "a new substantive legal liability or right," which Congress had not authorized (Pet. App. A-7).

3. The court of appeals reversed, applying in this case the principles it adopted in a companion case, *United States v. Bender Welding & Machine Co.*, 558 F. 2d 761 (see Pet. App. A-14 to A-22). The court stated in *Bender Welding* that (Pet. App. A-16 to A-17):

The key to the decision is an appreciation of the fact that the Veterans Administration is not required to provide free medical care to a veteran unless "[he] is unable to defray the expenses of necessary hospital

care." If compensation coverage is treated as giving an employee the ability to defray expenses, it necessarily follows that medical services need not have been rendered by the Government without charge. If the services provided by the Veterans Hospital are not free, they would become a proper obligation of the compensation carrier to the employee.

The court held that the Texas Workmen's Compensation Act, which is based on "the broad economic theory that industrial accident costs should be chargeable to the industries as part of their overhead expenses" (Pet. App. A-12), gave Adams the ability to defray the expenses of his care (Pet. App. A-12 to A-13). Because Adams had a right to recover the reasonable cost of his care from petitioner, and because the Veterans' Benefits Act "was not intended to relieve an employer of his statutory duty of compensating an injured employee for the expenses incurred in the treatment of a job-related injury" (Pet. App. A-13), the court held that the United States is entitled to recover the cost of such care from petitioner, pursuant to the assignment authorized by 38 C.F.R. 17.48(d) and executed by Adams (Pet. App. A-13; see also *id.* at A-19). The court of appeals observed that "[a] contrary holding would be a windfall to the insurance carrier merely because the employee was a veteran able to obtain care at a V.A. hospital, and would be inconsistent with the right of recovery afforded a private hospital" (Pet. App. A-13).

Petitioner sought rehearing on the ground that Texas law prohibits the assignment of workers' compensation benefits (Pet. App. A-24). The court of appeals rejected this argument, holding that the VA regulation authorizing such assignments overrides any contrary state rule (*ibid.*). Moreover, the court observed that the purpose of the

Texas law prohibiting assignments is "to protect employees against the improvident distribution of benefits meant to sustain them during their period of disability and to protect them against old creditors' claims," whereas the assignment procured by the VA in this case "operates to the benefit of the injured worker because it allows the Veterans Administration to give treatment first and worry later about whether the worker was entitled to free care because of inability to defray the costs" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, and we generally rely on its opinions. The decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, there is no reason for review by this Court.

Petitioner relies on *United States v. Standard Oil Co.*, 332 U.S. 301, and *Pennsylvania National Mutual Casualty Insurance Co. v. Barnett*, 445 F.2d 573 (C.A. 5), for the proposition that the United States may not recover from private parties the costs of medical care furnished by the United States. But this case and *Standard Oil* are quite different. In *Standard Oil* the government sought to recover hospitalization costs for a soldier struck by a truck, on a novel tort theory that the truck driver had interfered with a special relationship between the government and the soldier and had injured the government's interest (332 U.S. at 304 n. 5). In denying the government's claim, this Court held that the creation of such a new cause of action was a matter for Congress. The Court stressed that "[t]he Government's claim, of course, is not one for subrogation. * * * The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one" (332 U.S. at 304 n. 5, 314 n. 21). The present case, by

contrast, involves subrogation; the government asserted its claim under the assignment it received from the injured employee. This case does not involve a new theory of tort or contract liability, and it does not involve "direct" liability to the United States. Petitioner's liability to Adams is undisputed. The United States' claim is no more novel than the assignor's claim, and nothing in *Standard Oil* prevents the United States from standing in Adams' shoes to recover on his valid claim.²

Petitioner's reliance on *Barnett* fares no better. In that case the court of appeals denied recovery to the government because it had not obtained an assignment from the injured employee (445 F.2d at 574-575). Here, in contrast, the VA procured the necessary assignment. The court of appeals thus properly concluded that its decisions

²The court of appeals properly upheld the assignment despite a state provision (Texas Workmen's Compensation Act, Tex. Rev. Civ. Stat. Art. 8306, §3) limiting the assignment of benefits (Pet. App. A-23 to A-25). The state provision protects employees against improvident distribution of benefits intended to sustain them during convalescence. The purpose of that provision is obviously served by applying such benefits to hospital expenses. Indeed, Section 7 of the state statute (see pages 2-3, *supra*) appears to contemplate allowing a health care provider to collect sums due for care furnished to the employee. The interpretation of this state law provision in the court below does not require review here, especially in light of the fact that the responsible state administrative agency allowed the United States' claim. Cf. *Bishop v. Wood*, 426 U.S. 341, 346.

At all events, the federal regulation allowing assignment would displace contrary state law. *Free v. Bland*, 369 U.S. 663. Moreover, the state statute limiting assignments is inapplicable here because of the settled principle that "[a] general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States v. Wittek*, 337 U.S. 346, 358-359 (footnote omitted); *Hancock v. Train*, 426 U.S. 167, 179.

are "consistent" (Pet. App. A-19).³ In any event, any conflict between decisions of different panels of the same court would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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The decision here is also consistent with the decisions of two federal district courts (*United States v. Kirkland*, 405 F. Supp. 1024 (E.D. Tenn.); *United States v. Chicago White Metal Casting Co.*, N.D. Ill., No. 73-C-2424, decided January 16, 1974 (see Pet. App. A-36 to A-42)) and five state courts (*Marty v. Western Auto Supply Co.*, 269 So. 2d 583 (La. Ct. App.); *Marshall v. Rebert's Poultry Ranch & Egg Sales*, 268 N.C. 223, 150 S.E. 2d 423; *Brauer v. J.C. White Concrete Co.*, 253 Iowa 1304, 115 N.W. 2d 202; *Stafford v. Pabco Products, Inc.*, 53 N.J. Super. 300, 147 A. 2d 286; *Higley v. Schlessman*, 292 P. 2d 411 (Okla. Sup. Ct.). Although *Texas Employers Insurance Association v. United States*, 390 F. Supp. 142 (N.D. Tex.), supports petitioner, that decision, by a district court in the Fifth Circuit, is of no effect as a precedent in light of the decision in the present case.